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Remuneration for Home Copying: A Controversial Directive Remains Elusive

INTRODUCTION

Home taping is the private, non-commercial copying of audio and video material.¹ A debate has emerged that has centered around whether copyright owners should be compensated by way of a levy on blank tapes and audiovisual equipment for alleged losses to them caused by home taping.² A draft directive on home copying would guarantee the creators of musical compositions and films payment of copyright on home copying of their works and would establish a uniform levy on blank audio and video cassettes and recording equipment in all European Union (EU) Member States.³

The draft has been gathering dust on the European Commission's (Commission) shelves for over three years.⁴ The Council of Ministers (Council)⁵ and the Commission,⁶ as well as the Member States, have been divided over this issue.⁷ Currently, the United Kingdom (UK), Ireland and Luxembourg lack any system of protection against home copying, and the systems in effect in other Member States vary widely.⁸ The UK has criticized the proposal, as have European manufacturers and importers of tapes and consumer electronics who fear the effect of rising prices.⁹ Critics claim that the levies penalize all consumers of

¹ THE HOME TAPING RIGHTS CAMPAIGN, THE CASE AGAINST LEVIES I (1992) [hereinafter CASE AGAINST LEVIES].

² Michael Hart, *Home Taping: the Downfall of the Tape Levy*, COMPUTER L. & PRAC., Sept.-Oct. 1988, at 8.

³ *Home Copying: Commission to Propose System of Taxes*, European Information Service, Sept. 6, 1994, available in LEXIS, World Library, Allnws File [hereinafter *Home Copying*].

⁴ *Id.*

⁵ The Council makes the major policy decisions of the European Union. It is composed of six ministers, who change according to the issue being addressed. GEORGE A. BERMANN, ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 51 (1993).

⁶ The Commission initiates proposals and implements EU policy. Each country nominates members to serve four-year terms. *Id.* at 57.

⁷ *Copyright: Difficult Move Towards Blank Tape Tax*, European Information Service, Oct. 8, 1992, available in LEXIS, World Library, Allnws File [hereinafter *Copyright*].

⁸ *Home Copying*, *supra* note 3.

⁹ See Andrew Marshall, *Discord in Moves to Harmonize Tape Levy*, THE INDEPENDENT, Aug. 22, 1994, available in LEXIS, World Library, Allwld File [hereinafter Marshall].

blank tape and recording equipment, regardless of how the equipment is used.¹⁰ On the other hand, the film and music industries and national copyright associations favor a directive that would reimburse copyright owners for breaches of that right.¹¹ The Commission estimates that forty percent of the blank tapes in the EU are used to violate authors' rights, and the consequential loss of revenue is substantial.¹² Furthermore, the Commission hopes to remove the obstacle to the free movement of blank tapes and audiovisual equipment that has resulted from different national legislations.¹³

Part I of this Note recalls the origins and legal bases of remuneration, or compensation for home copying. Part II addresses the differences in national legislation in the EU Member States, and the effect of harmonization. Part III discusses the arguments for and against the EU proposal. Part IV will analyze whether the current proposal will be adopted and its subsequent impact. Finally, this Note concludes that the current proposal has attempted to satisfy too many interests and no longer attempts to harmonize legislation, which may cause its downfall.

I. THE HISTORY AND LEGAL BASIS OF REMUNERATION FOR HOME COPYING

In 1949, the International Confederation of Societies of Authors and Composers (CISAC) first discussed the idea of protecting the rights of authors through the statutory grant of remuneration calculated on recording equipment and blank tapes, when their works are used or reproduced for personal or private use.¹⁴ Although the CISAC recognized that the current methods of reproducing intellectual works could result in infringement of authors' rights, its recommendation that new solutions should be developed in order to protect the legitimate interests of authors was not pursued.¹⁵ It was not until the 1967 revision of

¹⁰ CASE AGAINST LEVIES, *supra* note 1, at 3.

¹¹ Amelia Torres, *EU Commission to Propose Levies on Home Copying of Tapes*, The Reuter Business Report, Aug. 17, 1994, available in LEXIS, World Library, Allnws File [hereinafter Torres, *EU Commission*].

¹² *EU Commission Delays Vote on Harmonizing Levies on Tapes*, Daily Report for Executives(BNA), Sept. 13, 1994, available in LEXIS, Lglnws Library, Curnws File [hereinafter *EU Commission Delays Vote*].

¹³ See *Home Copying*, *supra* note 3.

¹⁴ Taddeo Collovà, *La rémunération pour copie privée* [*The Remuneration for Private Copying*], 149 REVUE INTERNATIONALE DU DROIT D'AUTEUR 35, 36 (1991).

¹⁵ *Id.* at 38.

the Berne Convention (Berne)¹⁶ that the author's exclusive right to authorize the reproduction of his or her works in any manner or form was recognized as the general right of reproduction.¹⁷

Berne did not deal explicitly with the issue of home copying.¹⁸ It did provide in Article 9(2), however, that home copying was a matter for national legislation to permit reproduction in certain special cases, provided that the reproduction did not conflict with a normal exploitation of the work and did not unreasonably prejudice the author's legitimate interests.¹⁹ Furthermore, the language of Article 9(2) implies that the exception is inconsistent with Berne unless the withdrawal of the author's exclusive right is combined with appropriate financial compensation.²⁰ Accordingly, most Member States have enacted legislation introducing levies to provide remuneration for acts of home copying.²¹ There is no trend among Member States expressly permitting home copying without remuneration.²²

Harmonization of existing national legislation at the EU level has been difficult.²³ On January 26, 1988, the Council published a Recommendation²⁴ in favor of the introduction of authors' rights to remuneration for sound and audiovisual private copying of their works.²⁵ Conversely, the Commission seemed ambivalent about levies on blank recording tapes in its 1988 "Green Paper on Copyright and the Challenge of Technology," which was its first attempt to introduce a coherent legislative framework for copyrights in the EU.²⁶ The Commission

¹⁶ The Berne Convention for the Protection of Literary and Artistic Works was concluded in 1886 and was last amended in 1979. *Protection of Intellectual Property Rights: Berne Convention of September 9, 1886 for the Protection of Literary and Artistic Works*, Basic Documents of Int'l Econ. L., 1990, available in LEXIS, Intlaw Library, Bdiel File [hereinafter *Protection of Intellectual Property Rights*]. It strives to protect the rights of authors in their literary and artistic works. See *id.* As of January 1, 1988, 77 states were party to the Convention. *Id.*

¹⁷ Collovà, *supra* note 14, at 40.

¹⁸ Copyright and the Challenge of Technology: Green Paper from the Commission, COM(88)172 final at 103 [hereinafter Green Paper].

¹⁹ Collovà, *supra* note 14, at 40. At the Convention, it was stressed that the development of modern reproduction processes in the private sector threatened to dilute the author's reproduction right. *Id.* at 80. Even though the reference to special cases is not specified, it cannot include the majority of cases or else the right would be negated. *Id.* at 82.

²⁰ *Id.*

²¹ *Id.* at 46-56.

²² Green Paper, *supra* note 18, at 103.

²³ See *Home Copying*, *supra* note 3.

²⁴ Collovà, *supra* note 14, at 56.

²⁵ *Id.*

²⁶ See *Green Paper*, *supra* note 18, at 132. The Commission, however, did recognize that home

changed its original position after holding a hearing and asking for submissions from interested parties regarding the issues presented in the Green Paper.²⁷ Subsequently, in 1991, the Commission released a "Follow-up to the Green Paper" in which it argued in favor of new legislation on home copying at the EU level.²⁸ The Commission also committed itself to drafting a proposal for a directive on home copying.²⁹

In September 1992, the Commission forwarded a proposal to the Council to impose a levy on audio and video "blank recording media," as well as recording equipment.³⁰ Under this proposal, a single rate would be set for each product, to be paid by manufacturers and importers and distributed to authors and performers through collective management companies.³¹ This proposal initially failed to gain support among the EU ministers.³² Finally, however, at a November 10, 1992 meeting of the Council, the idea elicited a favorable response, and the Commission decided to draft a directive.³³ The Commission has never formally unveiled this draft.³⁴ Newspapers, however, have reported on its contents over the last three years.³⁵ Although the Commission was scheduled to vote on the directive at the end of September 1994,³⁶ it has repeatedly delayed such action.³⁷

II. DIFFERENCES IN NATIONAL LEGISLATION

A number of factors may be responsible for disparities in national legislation on home copying.³⁸ They include: (1) determining the basis

copying could prejudice the interests of right holders, so they encouraged technical measures to limit the scope of the copying facility of digital audio machines. *Id.* at 136.

²⁷ Follow-up to the Green Paper: Working Programme of the Commission in the Field of Copyright and Neighboring Rights, Com(90)584 final at 11-12.

²⁸ *Id.* at 13.

²⁹ *Id.*

³⁰ See *Copyright*, *supra* note 7.

³¹ *Id.*

³² *Id.*

³³ Coopers & Lybrand, E.C. Commentaries, *Intellectual Property Report*, §8, Oct. 27, 1994, available in LEXIS, Intlaw Library, Eurscp File.

³⁴ See Judy Jones & Martin Wroe, *Tape Levy Threatens Newspapers for the Blind*, THE INDEPENDENT, Aug. 22, 1993, available in LEXIS, World Library, Allwld File [hereinafter Jones & Wroe].

³⁵ *Id.*

³⁶ *EU Commission Delays Vote*, *supra* note 12.

³⁷ Amelia Torres, *Commission Plans For Royalties on Blank Tapes Bugged Down*, The Reuter European Community Report, Oct. 5, 1994, available in LEXIS, World Library, Allnws File [hereinafter Torres, *Commission Plans*].

³⁸ Collovà, *supra* note 14, at 58.

on which the remuneration is calculated; (2) specifying that the remuneration is of a private nature and that right owners should receive the proceeds; (3) eliminating the employment of proceeds for public use; and (4) assimilating foreign right owners to national ones and respecting the principle of equal treatment.³⁹ Thus, these factors must be addressed if home copying legislation is harmonized at the community level.⁴⁰

The reproduction of intellectual works for private use constitutes a method of use which comes under the author's reproduction rights.⁴¹ Additionally, pursuant to Berne, Member States cannot leave authors without adequate protection in connection with the reproduction of their works.⁴² Therefore, in determining the specific provisions that are needed to give that protection, one must consider the basis on which the remuneration is calculated.⁴³ With respect to the legislatures that have already enacted specific provisions for remuneration of home copying, Germany, Spain, and Portugal have opted for a system in which the remuneration is payable on blank mediums and recording equipment.⁴⁴ France bases the remuneration solely on blank mediums.⁴⁵

In order to harmonize EU law in this area, there must be a uniform basis for calculating the remuneration.⁴⁶ Either all Member States must base the remuneration on both mediums and equipment, or Member States that have already established the dual basis for remuneration must amend their legislation to include just one.⁴⁷ The effect of Member States maintaining inconsistent laws regarding the basis of remuneration will be the non-harmonization and persistent distortion of competition in the single market.⁴⁸ If manufacturers or importers of blank tapes or recording equipment market their products in a Member State where the remuneration rate is high, they are at a competitive disadvantage compared with those in another Member State where the remuneration rate is low or non-existent.⁴⁹

³⁹ *Id.*

⁴⁰ *See id.*

⁴¹ *Id.* at 60.

⁴² *Id.*

⁴³ *See Collovà, supra* note 14, at 66.

⁴⁴ Green Paper, *supra* note 18, at 105–06.

⁴⁵ *Id.*

⁴⁶ Collovà, *supra* note 14, at 68.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Copyright, supra* note 7.

Secondly, EU legislation must specify that remuneration is a private right, pursuant to the general right of reproduction, and that right owners should receive the proceeds.⁵⁰ Currently, some states maintain an inconsistent position, using proceeds for public use.⁵¹ Austria was the first European country to pass a provision which allocated a substantial portion of the collected proceeds for social welfare, rather than a direct remuneration to right owners.⁵² Arguably, this type of provision is within the spirit of Berne and encourages other States to enact remuneration legislation in order to benefit from the “partial socialization” of royalties.⁵³ That an otherwise valid regulation under Berne stipulates that part of the remuneration must be used for social and/or cultural purposes does not necessarily mean that the regulation contravenes Berne.⁵⁴ Conversely, if social institutions funded with royalties do not belong in the copyright sphere, they should not be funded by copyright derived monies.⁵⁵ Even if remuneration for private copying does fall within Berne, it does not necessarily lead to the conclusion that the implementation of a system that allocates the proceeds to social institutions also does.⁵⁶

Arguably, the allocation of funds for public good is an outgrowth of the already established practice of authors’ societies deducting ten percent of royalties for authors’ social funds, which dates back more than fifty years.⁵⁷ The authors agree to this deduction themselves, and fellow authors are named beneficiaries.⁵⁸ This practice cannot be compared to the automatic deduction which would be imposed by the EU.⁵⁹ In effect, the EU deduction would transform rights of private interests into rights of public interest.⁶⁰ The involvement of social institutions funded by royalties is not within the copyright sphere, and therefore,

⁵⁰ Collovà, *supra* note 14, at 58.

⁵¹ See *id.* at 46–56.

⁵² *Id.* at 108.

⁵³ *Id.* at 112, citing Dillenz, *La rémunération pour copie privée et le principe du traitement national*, LE DROIT D’AUTEUR, June 1990, at 196.

⁵⁴ *Id.*, citing Walter, *Die Grundsätze des Konventionsrechts vor dem Hintergrund der neueren urheberrechtlichen Entwicklungen*, Osgrum 1988, vol. 7, at 238.

⁵⁵ Collovà, *supra* note 14, at 116.

⁵⁶ *Id.* at 114–15.

⁵⁷ See *id.* at 120.

⁵⁸ *Id.* at 122.

⁵⁹ *Id.*

⁶⁰ Collovà, *supra* note 14, at 122.

does not have a legal foundation within this context.⁶¹ Currently, national legislation differs as to the allocation of the remuneration funds.⁶²

Finally, one must consider assimilating foreign right owners with national ones and respecting the principle of equal treatment.⁶³ Article 5(1) of Berne indicates that States should grant nationals of other countries the same rights as those granted to national authors.⁶⁴ National treatment is applicable to those rights which are recognized as authors' rights by virtue of Berne.⁶⁵ Therefore, the exclusive right of reproduction should receive national treatment because it is an author's right under Berne.⁶⁶

Since the basis of the remuneration for home copying is the reproduction right, the prevention of foreign authors from sharing in the distribution of the proceeds from private copying contravenes the national treatment provision in Berne.⁶⁷ Nevertheless, not all countries are signatories to Berne,⁶⁸ and in recent years, unwritten exceptions to Berne's underlying policy of national treatment have emerged in the copyright laws of some Berne-member countries.⁶⁹ Currently, national legislation varies as to whether foreign authors are entitled to receive a share of the remuneration.⁷⁰

⁶¹ *Id.* at 116.

⁶² In Austria, the larger part of the proceeds (51%) is required to be used for social welfare purposes rather than all the proceeds being allocated directly to right owners. *Id.* at 108. In France, the administration societies are required to use 25% of the proceeds to promote creation and live entertainment. *Id.* at 50. In Germany, the remuneration is still for the exclusive benefit of right owners. *Id.* at 48.

⁶³ Collovà, *supra* note 14, at 58.

⁶⁴ *Id.* at 126.

⁶⁵ *Id.* at 118, citing Burger, *The New Photocopy Remuneration Provisions in the Federal Republic of Germany and Their Application to Foreign Authors Under International Copyright Law*, IIV 1988, 488, 495.

⁶⁶ *Id.*

⁶⁷ *Id.*, citing Ndiaye, *L'administration collective des droits en générale*, presented at the Copyright Seminar organized by WIPO and the Copyright Office, Washington, September 17–25, 1990.

⁶⁸ For example, the United States is not a member of the Berne Convention. *Protection of Intellectual Property Rights*, *supra* note 16.

⁶⁹ *National Treatment Under Berne is Subject of House Panel Hearing*, 46 PAT. TRADEMARK & COPYRIGHT J. 116, 116 (1993) [hereinafter *National Treatment*]. An example of this is France's legislation regarding home copying remuneration. *Id.* It denies United States copyright owners access to the royalties collected from the levy. *Id.* They base the law on the principle of reciprocity. *Id.* The United States lacks a comparable law and, according to the French, the works involved are not Berne-protected works. *Id.*

⁷⁰ In Portugal, foreign authors are not entitled to receive a share of the remuneration. Collovà, *supra* note 14, at 50.

III. ARGUMENTS FOR AND AGAINST HARMONIZATION

In its 1985 White Paper on intellectual property rights,⁷¹ the Commission stated that differences in legislation have an immediate negative impact on trade in the EU and the ability of business to regard the common market as a whole.⁷² In *EMI/Electrola GmbH v. Patricia Im-und Export Verwaltungsgesellschaft mbH* (*EMI/Electrola*), the European Court of Justice (ECJ) explicitly dealt with the lack of harmonization of national laws as a source of restriction of the free movement of goods.⁷³ The Court stated:

In so far as the disparity between national laws may give rise to restrictions on intra-Community trade. . . , such restrictions are justified under Article 36 of the [EEC] Treaty if they are the result of differences between the rules governing the [specific copyright provision] and this is inseparably linked to the very existence of the exclusive rights.⁷⁴

EMI/Electrola and its progeny illustrate that the goal of the EEC Treaty to create a common market cannot be attained with respect to protected intellectual property rights as long as national laws substantially differ.⁷⁵ Since the 1988 Green Paper, the Commission has passed a series of directives, not only to harmonize but also to strengthen copyright laws in the EU.⁷⁶ The only draft directive that has not been unveiled, however, is the directive on home copying of sound and

⁷¹ Completing the Internal Market: White Paper from the Commission to the European Council, COM(85)310 def.

⁷² Herman Cohen Jehoram, *Harmonizing Intellectual Property Law Within the European Community*, 23 INT'L. REV. INDUS. PROP. COPYRIGHT 622, 622 (1992).

⁷³ Case 341/87, *EMI Electrola GmbH v. Patricia Im-und Export Verwaltungsgesellschaft mbH*, 79 E.C.R. 39 (1989). The legal term of protection of certain sound recordings had expired in Denmark, but not yet in Germany. Jehoram, *supra* note 72, at 624-25. The consent of the right owner was no longer required for distributing the recordings in Denmark. *Id.* When a third party distributed the recordings without consent, the right owner relied on his rights in Germany to request an injunction against the unauthorized importation of his records into Germany which had already been sold legally without his consent in Denmark. *Id.*

⁷⁴ Jehoram, *supra* note 72, at 625 (quoting *EMI/Electrola* 79 E.C.R. 39).

⁷⁵ *Id.*

⁷⁶ *Id.* at 627. These directives include: harmonization of the term of protection of copyright and certain neighboring rights; coordination of certain rules concerning copyright and neighboring rights applicable to satellite and cable broadcasting; harmonization of the legal protection of databases, rental right, lending and certain neighboring rights; and a decision that all Member States will ratify or adhere to the 1971 Paris Act of the Berne Convention and the Rome

audiovisual recordings.⁷⁷ It has been extremely controversial due to conflicting industry interests.⁷⁸

There are three potential arguments in opposition to the implementation of a harmonized levy.⁷⁹ First, a harmonized levy would cause the price of blank cassettes and equipment to increase.⁸⁰ Officials in the manufacturing industry claim that the levy will be passed on to the consumer and prices of blank tapes could rise by more than sixty percent.⁸¹ Conversely, the Music Copyright Reform Group (MCRG), which represents composers, songwriters, lyricists, and publishers and favors harmonization, claims that such a levy will not have any impact on prices.⁸² In fact, statistics indicate that prices have not increased in any of the nine EU countries that already impose such a levy.⁸³ It appears that the imposition of the royalty has stimulated competition and cost-cutting among blank-tape manufacturers.⁸⁴

Second, a levy would be, in effect, a tax on the blind, since audio tapes are vital for sightless people.⁸⁵ Opposition from the blind population has curtailed previous efforts to impose such a levy.⁸⁶ The National Federation for the Blind argues that any levy would affect thousands of blind people, many of them elderly and with low incomes.⁸⁷ Even if a directive contained an exemption for the blind, the cost of implementing and enforcing such an exemption would be overwhelming and would create confusion.⁸⁸ Much of this confusion would be a result of no universally recognized system of certification for blindness or partial sight.⁸⁹

Convention of 1961. Trevor M. Cook, *Copyright in the European Community*, 2 LEGAL ISSUES OF EUR. INTEGRATION 67, 69 (1992).

⁷⁷ *Id.* at 76.

⁷⁸ *Id.*

⁷⁹ Marshall, *supra* note 9.

⁸⁰ *Id.*

⁸¹ Torres, *EU Commission*, *supra* note 11.

⁸² See Marshall, *supra* note 9.

⁸³ *Laughing All the Way to the Blank*, EVENING STANDARD, NOV. 26, 1993, available in LEXIS, World Library, Allwld File.

⁸⁴ *Id.* In France, Germany and Austria, the price has actually decreased. *Id.*

⁸⁵ Marshall, *supra* note 9.

⁸⁶ *Id.*

⁸⁷ Jones & Wroe, *supra* note 34.

⁸⁸ *Id.*

⁸⁹ *Id.*

The third argument is perhaps the strongest.⁹⁰ If the levy is considered a tax, then the issue of whether or not the Commission has the right to impose it arises.⁹¹ Even if the Commission does have such power, one dissenting Member State could block the imposition of the tax.⁹² If it is not deemed a tax, however, and is considered an Internal Market rule, then the levy would be subject to qualified majority voting.⁹³ Arguably, one industry and consumers compensating another industry for an unquantifiable loss is more in the nature of a fiscal measure rather than a copyright measure.⁹⁴ Usually, the primary infringer is the unauthorized copier, and the person entitled to damages is the copyright owner whose works are infringed.⁹⁵ In this case, the levies will penalize all people who make, import or buy blank tapes and equipment, rather than the specific copyright infringers.⁹⁶ Furthermore, in the context of home copying, it is impossible to determine whose work is being infringed, so all copyright owners will benefit from the levy even though their work may not have been infringed.⁹⁷

Conversely, there are three arguments which support the harmonization of the levy on blank tapes and audiovisual and sound equipment. First, home taping deprives artists of the royalties normally paid when a piece of their work is purchased.⁹⁸ Since it is seemingly impossible to stop home taping, one response is to compensate the shortfall through the sales of equipment and tapes.⁹⁹ The Commission has estimated that forty percent of the blank tapes sold in the EU are used to violate authors' rights.¹⁰⁰ The British Phonographic Industry (BPI) estimates that the music industry loses 140 million pounds a year in lost record sales.¹⁰¹

Second, distortions in the application of the law between Member States also cause distortions in the royalties paid to authors in different

⁹⁰ See Marshall, *supra* note 9.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ CASE AGAINST LEVIES, *supra* note 1, at 7.

⁹⁵ *Id.* at 6.

⁹⁶ See *id.*

⁹⁷ *Id.*

⁹⁸ Marshall, *supra* note 9.

⁹⁹ *Id.*

¹⁰⁰ EU Commission Delays Vote, *supra* note 12.

¹⁰¹ Sarah Lonsdale, *EC's Home Taping Tax Set to Hit Our Wallets*, THE OBSERVER, Aug. 22, 1993, available in LEXIS, World Library, Allwld File.

countries since some schemes are applied on a reciprocal basis.¹⁰² Since the UK does not have a blank tape levy, UK copyright owners do not benefit from the other Member States' laws even though their works are being copied throughout Europe.¹⁰³ A harmonized law would help copyright holders recoup the revenue lost through home copying.¹⁰⁴

Finally, a harmonized scheme would end the distortion in trade.¹⁰⁵ There is a risk of unfair competition because of the different regulations in Member States.¹⁰⁶ Currently, a purchaser in Denmark can simply go to Germany to take advantage of savings afforded by Germany's lower levies.¹⁰⁷ In addition, under the current system, it would be possible to pay a remuneration levy in a Member State where it is at its lowest and escape the levy in other Member States by arguing that the royalties have already been paid once, and the product is entitled to move freely through the EU.¹⁰⁸

IV. ANALYSIS OF THE PROPOSED DIRECTIVE

Due to these competing arguments, the Commission continues to delay unveiling the draft directive to harmonize levies on blank audio and video tapes and recording equipment.¹⁰⁹ Although the press has reported upon the draft, the issue apparently has been dropped by the outgoing Internal Market Commissioner due to intense lobbying.¹¹⁰ No new discussions have taken place.¹¹¹

The current text of the draft directive, however, is no longer designed to harmonize national legislations on home copying, but instead seeks to ensure that basic provisions are implemented.¹¹² Al-

¹⁰² Marshall, *supra* note 9.

¹⁰³ *Id.*

¹⁰⁴ *EU Commission Delays Vote*, *supra* note 12.

¹⁰⁵ See Marshall, *supra* note 9.

¹⁰⁶ *Copyright*, *supra* note 7.

¹⁰⁷ Torres, *EU Commission*, *supra* note 11. Danes pay an extra .37 European Currency Units ("ECU") (45 cents) to buy a 60-minute audio tape, whereas Germans pay an extra .06 Ecus (7 cents). *Id.*

¹⁰⁸ *Copyright*, *supra* note 7.

¹⁰⁹ *EU Commission Delays Vote*, *supra* note 12.

¹¹⁰ Torres, *Commission Plans*, *supra* note 37.

¹¹¹ *Id.*

¹¹² *Home Copying*, *supra* note 3. The directive proposes the following rates on cassettes and recording equipment: (a) blank audio cassettes: .15 ECU per hour; (b) audio recording device: 2 ECU per device; (c) blank video cassettes: .25 ECU per hour; and (d) video recording devices: 10 ECU per device. *Id.* In addition, the Council can increase rates by up to 10 %. *Id.*

though the current text of the draft discusses rate levels and applicable products, it leaves a great deal of leeway to the Member States regarding the specific features of the legislation.¹¹³ The question, then, is whether or not the Commission can introduce this directive under Article 100A of the EEC Treaty.¹¹⁴

Article 100A applies only to legislation which constitutes harmonization measures to regulate the internal market.¹¹⁵ Measures introduced under Article 100A need only a qualified majority of the Council to be adopted, which is expected to be the case with this directive.¹¹⁶ Article 100A does not apply to fiscal measures, however, which need unanimity to be adopted.¹¹⁷ If the current proposal is not deemed a harmonization measure, then the UK, which opposes the idea of a levy,¹¹⁸ could effectively veto it.¹¹⁹

The current draft also calls for levies to be collected by bodies designated by Member States from the "first purchaser" and shared among creators, producers and performing artists through collective management companies.¹²⁰ Each category will receive at least twenty percent of the levy proceeds.¹²¹ This is different from earlier proposals which were more bureaucratic and called for the creation of a clearing house at the EU level to distribute the collected levies.¹²²

The new draft, however, allows each country to decide, within certain guidelines, how to allocate the money raised from the levies.¹²³ This leaves the directive open to attack by those who argue that government-imposed funding of cultural measures is similar to a fiscal measure, not a copyright measure.¹²⁴ Therefore, by allowing Member

¹¹³ *Id.*

¹¹⁴ See CASE AGAINST LEVIES, *supra* note 1, at 9.

¹¹⁵ *Id.* Article 100A states, "The Council shall. . . adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their objective the establishing and functioning of the internal market." TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Jan. 1, 1958, art. 100A, 298 U.N.T.S. 11 [EEC Treaty].

¹¹⁶ Marshall, *supra* note 9.

¹¹⁷ CASE AGAINST LEVIES, *supra* note 1, at 6.

¹¹⁸ See EU Commission Delays Vote, *supra* note 12.

¹¹⁹ See Marshall, *supra* note 9.

¹²⁰ Home Copying, *supra* note 3.

¹²¹ *Id.*

¹²² EU Commission Delays Vote, *supra* note 12.

¹²³ All Tied Up in Brown Tape, THE INDEPENDENT, Aug. 23, 1994, available in LEXIS, World Library, Allwld File [hereinafter *All Tied Up*].

¹²⁴ CASE AGAINST LEVIES, *supra* note 1, at 6. France, for instance, withholds half its existing levy from copyright holders, adding it instead to a general cultural subsidy fund. *All Tied Up*, *supra* note 123.

States the option of implementing such a fund, the draft directive falls within the category of a fiscal measure and needs unanimity to be adopted.¹²⁵

The current draft does not contain a reciprocity clause regarding the basis for distribution to copyright holders in other countries.¹²⁶ The Member States can either treat copyright holders from other countries the same as nationals or require reciprocity under a chosen system.¹²⁷ If the right to remuneration is subject to protection under Berne, which calls for national treatment, then allowing Member States to decide the issue of reciprocity raises serious questions about the effectiveness of Berne.¹²⁸ Arguably, however, a government should not provide the benefit if a majority of the money collected goes to foreign right owners.¹²⁹

Finally, the draft proposes that blind and deaf people shall be exempt from these taxes.¹³⁰ This satisfies the demand of many organizations who believe that the levy would unfairly penalize visually handicapped people.¹³¹ This provision, however, does not answer how exemptions will be determined since there is no universally recognized system for certification of blindness or partial sight.¹³²

CONCLUSION

Home copying will continue to cause a loss of royalties for copyright holders. By harmonizing remuneration legislation on an EU level, the Member States will decrease distortion of competition and at the same time compensate authors for lost royalties. Although it may be an imperfect way to accomplish the goal, the blank tape levy is already in place and being enforced in nine out of the fifteen EU countries. There is a strong legal foundation for the remuneration under Berne. So, even though opponents argue that the levy is a fiscal measure, it has developed directly from the copyright arena. Successful implementation of EU legislation will only serve to complete the attempt to harmonize intellectual property rights. Finally, as long as the Commis-

¹²⁵ See Marshall, *supra* note 9.

¹²⁶ *Home Copying*, *supra* note 3.

¹²⁷ *Id.*

¹²⁸ See *National Treatment*, *supra* note 69.

¹²⁹ *Id.*

¹³⁰ *Home Copying*, *supra* note 3.

¹³¹ See *CASE AGAINST LEVIES*, *supra* note 1, at 28–29.

¹³² Jones & Wroe, *supra* note 34.

sion continues to yield to special interest groups, the draft will lack the basic features that an effective directive should contain. Therefore, it is unlikely that any directive will be adopted in this area if the Commission is not willing to take a stand on the controversial issues.

Note: Since March 1995, the Groupement European des Sociates d'Auteurs et Compositeurs has been urging the Commission to introduce a harmonized system of remuneration, but as of September 1995, the Commission had still failed to take any action.

Renée L. Stasio